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IN THE
SUPREME COURT OF THE UNITED STATES

ALEXANDRIA CITY SCHOOL BOARD,
Petitioner

v.

A.K., A MINOR BY HIS PARENTS AND NEXT FRIENDS J.K. AND E.S.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

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MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The National School Boards Association ("NSBA"), the American Association of School Administrators ("AASA") and the National Association of State Directors of Special Education ("NASDSE") move this Court pursuant to Supreme Court Rule 37.2(a) for leave to participate as *amici curiae* herein for the purpose of filing the attached brief.

In support of their motion, *amici* state the following:

1. Counsel of record for both parties have received timely notice of *amici*'s intent to file the attached brief as required under Supreme Court

Rule 37.2(a). Petitioner has consented to the filing of the brief, and Respondents have declined consent.

2. The National School Boards Association is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 55 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

3. The American Association of School Administrators, founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

4. The National Association of State Directors of Special Education is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states. NASDSE's primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities. NASDSE provides important resources to educators that help improve and enhance the quality of special education services

and related curricula provided to students with disabilities. NASDSE's members are accountable for the proper implementation of the Individuals with Disabilities Education Act ("IDEA") and have responsibility under the law for general supervision of local school district implementation of the IDEA, which includes ensuring that Individualized Education Programs ("IEPs") are written within specific timeframes and include specific information and that services described in an IEP are delivered as prescribed in that document.

6. In light of *amici*'s longstanding involvement with special education issues, including advocacy before this Court and Congress, and the special expertise their members bring to bear on these issues, *amici* are well qualified to advise the Court of the importance of accepting this case for review given the Fourth Circuit's departure from the weight of precedent, regulatory interpretation and the collaborative intent of the law. In addition, *amici* are uniquely positioned to inform this Court of the negative impact the Fourth Circuit's decision, if allowed to stand, will have on the delivery of special education and related services to children with disabilities. This Court itself has recognized that under the (IDEA), 20 U.S.C. § 1400 *et seq.*, school officials, in light of their educational expertise, have special responsibility in carrying out the law.

For these reasons, NSBA, AASA and NASDSE respectfully urge this Court to allow them to provide additional information that will assist the Court in determining the need to review this case,

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 55 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. S. Ct.R. 37.6. Counsel of record for both parties received timely notice of *amici's* intent to file this brief. Petitioner has consented to the filing of this brief, and Respondent has declined consent. *Amici* have submitted herewith a motion for leave to file this brief pursuant to Supreme Court Rule 37.2(a).

The National Association of State Directors of Special Education (NASDSE) is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states. NASDSE's primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities. NASDSE provides important resources to educators that help improve and enhance the quality of special education services and related curricula provided to students with disabilities. NASDSE has a particular interest in this case because our members are accountable for the proper implementation of the Individuals with Disabilities Education Act ("IDEA"). NASDSE's members have responsibility under the law for general supervision of local school district implementation of the IDEA, which includes ensuring that IEPs are written within specific timeframes and include specific information and that services described in an IEP are delivered as prescribed in that document.

Recognizing that all children, including those with disabilities, have a right to be provided with free appropriate public education, *Amici* have consistently supported the rights of disabled children, while at the same time being particularly concerned over the significant amount of funds expended by their members every year above and beyond that provided by the Federal Government

for the education of those children.[2] The growth in the number of children who attend non-public schools at public expense has increased this burden.[3]

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's ruling threatens the collaborative process and ignores the practical realities underlying the development of Individualized Education Programs (IEPs) for children with disabilities.

There are presently over 6 million students, or 12.8 percent of the total public school population, who are being educated pursuant to IEPs collaboratively created by school officials and parents under the Individuals with Disabilities

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[2] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $59 billion for the last four fiscal years. NSBA, *Federal Funding for Education* at 2 (Mar. 2006), *available at* http://www.nsba.org/site/docs/35100/35033.pdf.

[3] According to the National Center for Educational Statistics, the number of private schools with a special education emphasis grew from 1059 in 1989-90 to 1634 in 2003-2004. *Characteristics of Private Schools in the United States: Results from Private School University Survey* (2004), *available at* http://nces.ed.gov/surveys/pss/. This reflects the growing number of non-public placements to which public schools have assigned students whose disabilities cannot be adequately addressed through the programs and services available in the public school system.

Education Act, 20 U.S.C. § 1400 *et seq.* (2005) ("IDEA") to address a vast variety of physical, mental, and learning disabilities ranging from cognitive disabilities to autism.[4] Where members of the IEP team collectively conclude that the school district is unable to provide adequate educational or related services to address a child's needs, the team may recommend that those services be provided by a private school. Non-public placements are generally made through a process that involves sending the child's educational history and completed IEP to a variety of local area private schools, each of which must then determine if the child is a proper fit for the programs offered by that school.

Parents are then encouraged to visit the proposed schools, which almost universally insist upon an interview with both the child and parents before making a final offer of placement. After the interview private schools always have the discretion to accept or reject a child that applies for enrollment. Thus, an IEP cannot prescribe enrollment at a specific private school because final admissions decisions are not available at the time the IEP is developed. In fact, a completed IEP describing the child's needs and the appropriate setting is viewed as a crucial element of the admissions process since it informs private schools of the child's needs necessitating a private setting

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[4] National Center for Education Statistics, Table 1.11 (Number and percentage of public school students with Individual Education Programs (IEP), by locale: 2003-04), NCES 2007-040 (June 2007), *available at* http://nces.ed.gov/pubs2007/ruraled/tablestable1_11.asp.

as well as the services that the school would be expected to provide to the child. An IEP that is not tied to one specific school recognizes the realities of this process. Naming a particular school that ultimately does not accept the child or ultimately does not work out for other reasons would necessarily require reconvening an IEP meeting in every such case to rewrite the IEP, thereby draining the time and resources of the school district and requiring parents to attend more meetings to repeat the IEP process, possibly numerous times.

In the *A.K.* case, as is typical in thousands of IEP team meetings conducted in school districts each and every week, the team determined that A.K. would be best served in a "private day school" setting (J.A. 379, 1103-04, 1108). The words "private day school" appearing in A.K.'s IEP, in turn, were described by the District Court as "a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 676, n.1 (4th Cir. 2007), App. 16a, n.1. Yet as is typical in situations where one or more schools were deemed potential matches for the child, the IEP did not include the precise name of the school at which the child would be assigned, thereby giving the parents a choice of at least two therapeutic private day schools, both of which the school district staff believed could implement the IEP. (JA 620, 635).

Indeed, the hearing examiner who initially heard the instant case as well as the U.S. District Court concluded that both placements proposed by the IEP team were capable of meeting A.K.'s needs. The parents, however, rejected both proposed schools based upon their subjective belief that neither was appropriate (JA 1186) and refused to cooperate in the interview process, instead choosing to place A.K. unilaterally in a private residential school located in another state, with a substantially higher cost to the school district.

The Fourth Circuit opinion concedes that the IEP team, which included the child's parents, identified at least two local area private schools deemed capable of meeting A.K.'s needs, finding fault only with the failure of the team to put the name of a specific school into the IEP. Based solely upon that alleged procedural default, the count asserts the novel proposition that "the offer of an unspecified 'private day school' was essentially no offer at all," and thus deprived A.K. of the free appropriate public education ("FAPE") to which the IDEA entitles him. 484 F.3d at 682, App. 15a. With seemingly little regard for the severe impact its decision could have on the thousands of school districts that develop IEPs in a similar manner, the Fourth Circuit gave cold comfort, stating "we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided." *Id.* The Fourth Circuit's rationale that there was a denial of FAPE here because "the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes," *id.*, simply

invites parents to not participate meaningfully in the required interview process for private schools—exactly as occurred here—to create a claimed denial of FAPE that they could pursue through the due process procedures that the IDEA makes available to parents who do not agree with their child's proposed IEP.[5] Under the Fourth Circuit's decision, the parents would no longer, as this Court ruled in *Schaffer v. Weast*, 546 U.S. 49 (2005), bear the burden of proving that the IEP failed to provide FAPE and school officials would no longer be entitled to the presumption that they are "properly performing their difficult responsibilities under this important statute." *Id.* at 63 (Stevens, J., concurring). Instead, it would be a foregone conclusion that the district failed to provide FAPE whenever the parents expressed doubt that the IEP goals could be met at any school suggested by the district.

Thus, the Fourth Circuit's opinion now subjects thousands of IEPs to the risk of being found materially flawed if they fail to include the name of a specific private school. If, as in this case, an IEP team suggests that more than one private school may be able to provide services to a child with a disability who requires placement in a private school, parents who have in mind another school for their child have no incentive to cooperate with the admissions and interview process, knowing that instead they could unilaterally place their child in a private school and then initiate a due process hearing request in which a hearing officer would

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[5] 20 U.S.C. § 1415 (2005).

likely feel compelled under the Fourth Circuit's decision to rule in their favor. Besides discouraging meaningful collaboration, the Fourth Circuit's ruling forces school districts to rush to place into the IEP the name of a school that may or may not be a true match for the child, simply to avoid being accused of making "no offer at all." *Id.* This practice exalts form over substance and does not ultimately serve the interests of the child.

It was out of concern for this anticipated result that Judge Roger Gregory strongly dissented from both the majority opinion and the decision of the other Fourth Circuit judges denying rehearing *en banc*:

> It is difficult to understand how A.K. could have lost educational opportunity on account of the omission of the schools' names from his IEP when his parents understood both [local private] schools were under consideration and had already expressed that neither was appropriate for their son.

A.K., 484 F.3d at 686. The prospect of the majority decision becoming the law of the land would present additional burdens for school districts attempting in good faith to offer appropriate educational opportunities for children with disabilities:

> Under our present jurisprudence, public school districts are vulnerable to those who could use the unclear state of the law to their advantage. In

> particular I worry that public schools could be liable for large sums because of errors that, as here, have no adverse impact on the quality of the educational program made available to the student. Regrettably, our public schools today face greater social challenges than before with ever shrinking financial resources; and we should be careful not to expose them to a greater burden than Congress intended them to bear.

A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 497 F.3d 409 *reh'g denied*, (4th Cir. 2007) (Gregory, J., dissenting from denial of rehearing en banc).

What the Fourth Circuit failed to appreciate is that the IDEA is purposely designed to foster the development of IEPs through a collaborative process that includes the child's parents and encourages resolution of disputes through non-adversarial means such as mediation and resolution hearings.[6] When these measures fail to result in an agreement between the parties, and parents have chosen to place their children unilaterally in a private school of their own choosing, the law mandates that they meet specific requirements[7] before being entitled to seek tuition reimbursement through due process and, if necessary, court proceedings in which they would bear the burden of proving that the school district failed to provide FAPE. The statute does not

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[6] 20 U.S.C. § 1415(e), (f)(1)(B) (2005).

[7] 20 U.S.C. § 1412(a)(10)(C) (2005).

contemplate—as the Fourth Circuit's ruling appears to allow through its narrow and erroneous interpretation of one provision—that parents can simply refuse to cooperate in good faith in the IEP process and ultimately obtain at public expense their preferred placement for their child without any burden of proof whatsoever. By subverting the collaborative framework set forth in the IDEA, the Fourth Circuit's ruling will ensure that there will be more high cost litigation of due process complaints when what is intended to be a cooperative process breaks down. *Schaffer*, 546 U.S. at 59.

Should this Court fail to correct the Fourth Circuit's flawed reasoning in this case, IEP teams will rush to identify possibly inappropriate placements simply to avoid the risk of being found responsible for a "substantive" violation of FAPE. Under long-existing regulations promulgated by the Office of Special Education and Rehabilitative Services ("OSERS") governing the determination of placement for special education programs, a "child's placement" should be "based on the child's IEP; and [be] as close as possible to the child's home." 34 C.F.R. § 300.116(b)(2), (3) (2006). The Fourth Circuit's ruling in this case violated both concepts, by compelling the Petitioner to fund a residential placement far from home, providing services and programs that the IEP team did not feel were based on A.K.'s IEP. What the Fourth Circuit appears to have forgotten is that for a school district to comply with the foregoing regulation, it is the IEP that should govern the placement, and not the other way around. Allowing the Fourth Circuit's decision to stand will turn that concept on its ear, hastening placement decisions that are not driven by the

needs of the child and the services prescribed under that child's IEP, and potentially resulting in placing a greater number of children in schools far from their home.

II. The Fourth Circuit ignores the U.S. Department of Education's interpretation of "location" upon which school officials have properly relied in developing IEPs.

Under the IDEA an IEP must include "the projected date for the beginning of the services and modifications . . . and the anticipated frequency, location, and duration of those services and modifications" 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2005). The U.S. Department of Education has interpreted the word "location" to mean the type of environment (such as regular classroom, separate resource room, etc.) *within* a school, rather than the identity of a specific school:

> The "location" of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?

64 Fed. Reg. 12594 (March 12, 1999) (commentary to regulations implementing 1997 amendments to IDEA). Petitioner cites a number of Office of Special Education Programs ("OSEP") opinions that

apply this interpretation to the word "location," in recognition of the not infrequent reassignment of students during the life of their IEP for such reasons as: 1) the transfer of an educational program from one classroom or even one school building to another; 2) the departure of a teacher assigned to a particular special education class, requiring the school district to reassign the students elsewhere; 3) the relocation of pull-out services (such as speech-language or physical therapy) from the child's classroom to another location in the school or even to an after-school facility deemed more suitable for delivering those services; 4) a child's "graduation" from elementary to middle school, or from middle to high school;[8] 5) the transfer of children from a classroom led by a teacher deemed not to be "highly qualified" under the No Child Left Behind Act ("NCLB")[9] to a classroom (or school) where the teacher meets that requirement of the law; 6) the transfer of children from a school that has consistently failed to make

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[8] *See, e.g., John M. v. Board of Educ. of Evanston Twp. High Sch. Dist. 202,* 502 F.3d 708 (7th Cir. 2007) (reviewing authority from various circuits in interpreting "'educational placement' to incorporate enough flexibility to 'encompass [the child's] experience" and that "[w]hen a child progresses from preschool to elementary school, from elementary school to middle school or from middle school to high school, the 'status quo no longer exists'"), *quoting Board of Educ. of Community High Sch. Dist. No. 218 v. Illinois State Bd. of Educ.,* 103 F.3d 545 (7th Cir. 1996); *Ms. S ex rel. G v. Vashon Island Sch. Dist.,* 337 F.3d 1115 (9th Cir. 2003).

[9] 20 U.S.C. § 6301 *et seq.* (2002).

annual yearly progress,[10] or is deemed to be "persistently dangerous;"[11] and 7) the transfer of a program due to renovations or other activities in the school that interfere with the program's success.[12]

The Fourth Circuit's rejection of the administrative agency's interpretation of the ambiguous word "location" found in the statute flies in the face of this Court's longstanding

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[10] 20 U.S.C. § 6316(b)(1)(E) (2002). This provision of the NCLB offers students "the option to transfer to another public school served by the local educational agency, which may include a public charter school, [where the home] school has been identified for school improvement . . . " *See also* 20 U.S.C. § 6316(b)(1)(F) (2002) ("Students who use the option to transfer under subparagraph (E) . . . shall be enrolled in classes and other activities in the public school to which the students transfer in the same manner as all other children at the public school."). This reflects the need to insure replication of educational opportunities, services, and treatment, regardless of the individual location of the school that a child attends. This same guarantee—of replicated services wherever a child attends—was all Congress intended in its reference to "location" in the IDEA. The Fourth Circuit opinion gives this term too narrow a reading and utterly ignores the adjective "anticipated" that describes the word "location" in the statute. This Court has long held that no words contained in a statute are to be presumed to be superfluous. *See, e.g., Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 126 S.Ct. 2455 (2006). For more discussion, see section III. *infra* at 16.

[11] 20 U.S.C. § 7912 (2002). Imagine the absurdity of requiring affirmative approval by the IEP team convened for the sole purpose of honoring a parent's statutory right to insist that his or her child be relocated to an identical educational program from a school deemed to be "persistently dangerous" under this provision of the NCLB. The Fourth Circuit's majority's reasoning in *A.K.* would necessitate this needless practice under these circumstances.

[12] 20 U.S.C. § 1401(10)(A), (B) (2005).

jurisprudence. *See, e.g., Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984). As this Court only recently reaffirmed, "if the language of the statute is open or ambiguous—that is, if Congress left a 'gap' for the agency to fill—then we must uphold the Secretary's interpretation as long as it is reasonable." *Zuni Pub. Sch. Dist. No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1540 (2007). "This is an absolutely classic case for deference to agency interpretation." *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005). In *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004), the Fourth Circuit did, in fact defer to this regulatory interpretation in holding that transferring a student to a different classroom in the school did not change the child's "educational placement" for purposes of the so-called "stay-put" provision of the IDEA.[13] In the instant case, the Fourth Circuit ignored its own decision just a few years ago that recognized such deference is in order.

In short, this Court should accept this case for consideration to reinforce to the lower courts and, by extension, to the thousands of due process hearing officers considering IDEA cases across the U.S., that school districts properly relying upon the administrative agency's interpretation of ambiguous statutory language should not be found to have violated the IDEA. To allow the Fourth Circuit's decision to stand invites the chaos of challenges

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[13] The "stay-put" provision of the statute prescribes that a student's "educational placement" will not change while disciplinary proceedings are pending against a student receiving special education services. 20 U.S.C. § 1415(j) (2005). *See Honig v. Doe*, 484 U.S. 305 (1988).

being launched to literally hundreds of thousands of IEPs that fail to identify specific school locations. It is manifestly unfair to charge well-meaning, highly knowledgeable educators who serve on IEP teams and who strive to provide FAPE to the most challenged special education students with denying those children adequate educational services merely because they have relied, in good faith, on an agency interpretation that is consistent with the statute and that recognizes the complexities of placing children in non-public educational facilities over which local boards of education have little control. Furthermore, this would strain the resources of state education agencies that have responsibility for ensuring that local school districts provide FAPE and would require the state agency to review thousands of IEPs to ensure their compliance with this new requirement.

III. The Fourth Circuit's decision ignores well established precedent from lower courts, and not yet addressed by this Court, distinguishing *de minimus* procedural violations of the IDEA from more serious substantive violations.

Compounding its erroneous interpretation that the "location" of services listed in a child's IEP is the equivalent to an "educational placement" specifying a particular school, the Fourth Circuit converts what could be at most a *de minimus* procedural violation of the IDEA into a substantive violation. The IDEA's requirement that an IEP set

forth "the anticipated frequency, location, and duration of services"[14] is a procedural requirement that addresses "practical, logistical considerations"[15] of a geographic nature that is relevant to concerns of scheduling and transportation, rather than an educational placement decision which goes to the heart of the child's instructional setting. With that in mind, given that the IDEA only requires the listing of the *"anticipated"*[16] location of services, other circuits have held that this requirement is procedural rather than substantive and that it is subject to change without changing the IEP itself.

In *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989), the United States Court of Appeals for the District of Columbia Circuit reasoned that, "This court has clearly held that '[a]n IEP is not location-specific; the place at which an IEP is implemented may change without the IEP itself changing.'" *Id.* at 1562-63, *citing Abney v. District of Columbia*, 849 F.2d 1491, 1492 n. 1 (D.C. Cir. 1988). Similarly, the United States Court of Appeals for the Fifth Circuit in *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003), urged that the term "'[e]ducational placement', as used in the IDEA, means educational program—not the particular institution where that program is implemented." *Id.* at 379, *citing Sherri A.D. v. Kirby*, 975 F.2d 193 (5th Cir. 1992) ("educational placement" is not a place, but a program of services); *Weil v. Board of Elem. & Secondary Educ.*, 931 F.2d 1069 (5th Cir. 1991),

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[14] 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2005).

[15] *A.K.*, 484 F.3d at 683.

[16] 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2005) (emphasis added).

cert. denied 502 U.S. 910 (1991) (transfer of child to another school was not a change in "educational placement"). The Fifth Circuit in *White* thus reasoned that, contrary to the parents' position, the IDEA's requirement "that parents must be involved in determining 'educational placement' does not necessarily mean they must be involved in site selection." *White*, 343 F.3d at 379.

Explaining further its decision that the "location" of services is an administrative decision separate and apart from the determination of "educational placement," the Fifth Circuit in *White* relied upon similar reasoning expressed by the United States Department of Education's Office of Special Education Programs to the effect that "[a]dministrative agency interpretations of the regulations confirm that the school has significant authority to select the school site, as long as it is educationally appropriate." *Id.* at 382. To that end, the Fifth Circuit noted as follows:

> The Office of Special Education Programs (OSEP), the Department of Education branch charged with monitoring and enforcing the IDEA and its implementing regulations, has explained:
>
> [I]f a public agency . . . has two or more equally appropriate locations that meet the child's special education and related services needs, the assignment of a particular school . . . may be an administrative determination, provided that the

> determination is consistent with the placement team's decision. *Letter from Office of Special Education Programs to Paul Veazey* (26 Nov. 2001). *See also, e.g., Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual needs of the student); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (citing policy letter indicating that assignment of a particular location is an administrative decision).

343 F.3d at 382. *Accord Weil*, 931 F.2d at 1072 (concluding that a "change of schools . . . was not a change in 'educational placement'"); *Christopher P. v. Marcus*, 915 F.2d 794, 796 n.1 (2d Cir. 1990), *cert. denied*, 498 U.S. 1123 (1991) (noting that "[t]he regulations implementing the Act interpret the term 'placement' to mean only the child's general program of education.").

The Fourth Circuit decision stands in stark contrast to other circuit court decisions across the country holding that the "location" of special educational services is an administrative determination separate and apart from the child's "educational placement." Petitioner's failure to specify the specific school where A.K. would receive services was, if a flaw at all, a procedural one that had no substantive impact on A.K.'s right to FAPE.

Earlier Fourth Circuit decisions, as well as decisions from other circuits, have consistently reaffirmed this conclusion. The issue of whether procedural violations rise to the level of a denial of FAPE thus supporting a parent's unilateral placement was addressed by the Fourth Circuit in *Dibuo v. Board of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002). In that case, the court reasoned that, "under well-established circuit precedent,"[17] there can be no "finding that a school district failed to provide a disabled child with a FAPE when the procedural violation *did not actually interfere* with the provision of a FAPE to that child." *Id.* (emphasis in original).

On this point, other circuits are in accord. For example, in *N. L. v. Knox County Sch.*, 315 F.3d 688 (6th Cir. 2003), the United States Court of Appeals for the Sixth Circuit expressed the following reasoning:

> [A] procedural violation of the IDEA is not a per se denial of a FAPE [free appropriate public education]; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents. Substantive harm occurs

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[17] *See, e.g., M.M v. School Dist. of Greenville County*, 303 F.3d 523, 533-534 (4th Cir. 2002); *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *Briley v. Board of Educ. of Baltimore County*, 87 F. Supp.2d 441, 444 (D. Md. 1999).

> when the procedural violations in question *seriously infringe* upon the parents' opportunity to participate in the IEP process.

Id. at 693 (emphasis added). *See M.L. v. Federal Way Sch. Dist.,* 394 F.3d 634, 653 (9th Cir. 2005) (Gould, J., concurring opinion), *citing W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23,* 960 F.2d 1479, 1484 (9th Cir. 1992) (alleged procedural errors constituted a denial of FAPE only when they result in the loss of educational opportunities or when they significantly restricts parental participation in the IEP process).

Similarly, in *Adam J. v. Keller Indep. Sch. Dist.,* 328 F.3d 804, 811 (5th Cir. 2003), the Fifth Circuit addressed a "litany" of alleged procedural violations that, according to the parents; had the effect of denying them "full participation." In rejecting the parents' argument that the alleged procedural violations constituted a denial of FAPE, the court cited with favor the other circuit opinions holding that procedural violations have no substantive impact and are not a denial of FAPE:

> The other circuits that have addressed this question head on have consistently held that "procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity," but to date we have never formally adopted or rejected this approach. We do so today.

Id. at 811-812, *citing DiBuo v. Board of Educ.*, 309 F.3d 184, 190 (4th Cir. 2002); *T.S. v. Independent Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001); *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

Thus the weight of circuit authority conflicts with the Fourth Circuit's decision that the omission of the name of a specific institution constituted a substantive denial of FAPE. In fact, A.K.'s parents had meaningful opportunities to participate in the development of the approved IEP and knew the private day schools contemplated by the Petitioner but failed of their own accord to bring A.K. for any interviews. Indeed, A.K.'s parents had already contracted with their residential school of choice for the upcoming school year in advance of A.K.'s IEP meetings, having pre-determined, without the benefit of any interviews, that none of the schools recommended by the Petitioner were appropriate. 484 F.3d at 686. Accordingly, the failure to specify the specific anticipated location of services in A.K.'s IEP was at most a minimal procedural flaw (if one at all) and should not have resulted in the Fourth Circuit finding that there was a denial of FAPE, thereby entitling the child to receive services at a private residential school at public expense.

Such a holding is at odds not only with earlier Fourth Circuit precedent but also with the weight of authority across the country. *See, e.g., White ex rel. White v. Ascension Parish Sch. Bd., supra* (5th Cir.); *Adam J. v. Keller Ind. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003); *Leonard v. McKenzie*, *supra* (D.C. Cir.); *C.J.N. v. Minneapolis Pub. Sch.*, 323 F.3d 630 (8th

Cir. 2002); *Christopher P. v. Marcus*, 915 F.2d 794 (2d Cir. 1990). The significant conflict in the circuits created by this case makes it particularly worthy of this Court's review. This decision not only poses an immediate concern to public education in the states comprising the Fourth Circuit, but unless corrected by this Court, it also will likely foster confusion among school districts nationwide and may encourage parents in the Fourth Circuit and elsewhere to place procedural form over substance—not only with respect to "location" and "placement" issues but also with other issues as well where, heretofore, technical procedural violations were not viewed as a denial of substantive FAPE.

CONCLUSION

For the foregoing reasons, the School Board's petition for a writ of certiorari should be granted.

Respectfully submitted,

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